No. 2396

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Appellees.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

HON. GEORGE DONWORTH, JUDGE.
HON. EDWARD E. CUSHMAN, JUDGE.

REPLY BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS THE APPEAL

WELSH & WELSH,
South Bend, Wash.
DORR & HADLEY,
Seattle, Wash.
Solicitors for Appellees.

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REPLY BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS THE APPEAL

Subsequent to the service upon counsel for appellant of our motion to dismiss, he has served a counter motion seeking an order directing the issuance of a new citation to the surety on the injunction bond, the party which did not join in the appeal, upon the theory that the defective appeal can be cured by the issuance of a new citation.

The citation is a notice issued, not to the appellant, but to the appellees, after the appeal has been perfected, directing him to appear in the appellate court and show cause why the judgment of the lower court should not be reversed. It properly belongs to proceedings under a writ of error, and not an appeal. It is not jurisdictional and may be waived.

> Rose's Code of Federal Procedure, Vol. 2, pp. 1522-24, citing numerous authorities.
> *Nome and Sinook Co. v. Am. Mercantile Co.,* 187 Fed. 929.

We emphasize this point of procedure as distinguished from the formal method of taking an appeal, by petition and allowance, because the authorities cited by counsel to oppose our motion are nearly all concerned with the issuance of new citations, a matter not properly involved here.

Our contention is that all the necessary parties against whom a joint judgment was entered have not joined in the appeal, and the defect being jurisdictional is one which can not be cured by amendment.

Section 1005 of the Revised Statutes permits certain amendments to writs of error in matters of form, and is the basis of most of the decisions relied upon by counsel for appellant:

> "The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the *teste* of

the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error. (R. S.)"

4 Fed. Stat. Ann., Sec. 1005, p. 617.

It will be observed that this statute permits amendments in matters of form when the rights of the defendant in error will not be prejudiced.

The case of *Estis v. Trabue,* 128 U. S. 225, quoted extensively in our main brief on the motion, expressly states that the omission of the sureties who were necessary parties to the appeal is a defect:

"* * * which cannot be reached by an amendment in or by this Court under §1005." (P. 229.)

The cases of:

Martin v. Buford, et al., 176 Fed. 554;
Teal v. Chesapeake Bay Co., 204 Fed. 914;
Browning v. Boswell, 209 Fed. 788;
Nome and Sinook Co. v. Am. Merc. Co., 187 Fed. 929,

are relied upon by counsel for appellant, but those decisions all involve the issuance of new citations in

cases wherein the name of a *successful party* had been omitted in taking the appeal, a proposition entirely foreign to the case at bar, which involves the failure of one of the *unsuccessful parties* to join in the appeal.

The rule is well stated in Rose's Code of Federal Procedure, Vol. 2, at page 1528, as follows:

> "An amendment will be refused also where a necessary party defendant has not been joined or severed for failure or refusal to join."

Counsel relies upon the case of *Gilbert v. Hopkins,* 198 Fed. 849-51, decided by the Circuit Court of Appeals of the Fourth Circuit, as being decisive of this question. In that case a motion to dismiss was based upon two grounds, first: that one of the *defendants in error* was omitted from the writ, and was not served with a citation; second: that the surety company on the *cost bond* of the plaintiffs in error was not joined as a plaintiff in error. The motion was denied, and the Court confined its discussion entirely to the first ground, which was based upon section 1005, R. S. No facts are stated in the opinion which in any way indicate that the surety company was a party to a joint judgment, which would make it a necessary party to the appeal. It is easy to differentiate between the liability on a mere cost bond, and the liability on an injunction bond, where the damages were assessed and judgment entered jointly against the principal and surety. The only reasonable conclusion, in absence of any statement of facts in the opinion in *Gilbert v.*

Hopkins and in view of the decisions of the Supreme Court of the United States, is that the liability of the surety in that case was not such as to bring it within the well-settled rule.

The decisions cited in our brief on the motion to dismiss are sufficient to establish beyond doubt that all the parties against whom a joint judgment is entered must join in the appeal, or show reason for non-joinder.

Estis v. Trabue, 128 U. S. 225;
Mason v. United States, 136 U. S. 581;
Masterson v. Herndon, 10 Wall. 416;
Dolan v. Jennings, 139 U. S. 385,

(and numerous other authorities cited in our brief.)

We wish also to direct the attention of the court to the case of *Copland v. Waldron* (9th C. C. A.), 133 Fed. 217.

An appeal was taken by two of three joint defendants from a judgment against all of them; a motion to dismiss the appeal was made because one of the joint defendants had failed to join in the appeal. A counter motion, based upon section 1005, R. S., was interposed for an order allowing the amendment of the citation so as to include the name of the third defendant, or for an order directing the issuance of a new citation *exactly as has been done in the case at bar.* The motion to amend the citation was denied, and motion to dismiss the appeal was granted, upon the authority of *Estis v. Trabue,* 128 U. S. 225, and *Mason v. United States,* 136 U. S. 581. Without quoting the opinion at length, we set

forth the syllabus, which correctly states the ruling of the court:

> "Where an appeal was taken by two of three defendants against whom a joint decree for a sum of money was rendered and the record fails to show that the third defendant, who made default in the court below, was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, under Rev. St. Section 1005 (U. S. Comp. St. 1901, p. 714), but is fatal to jurisdiction of the appeal."

Copland v. Waldron, 133 Fed., p. 217.

We submit that the failure of one of the parties, against whom a joint judgment was entered, to join in the appeal, is a jurisdictional defect which cannot be cured by amendment; and in view of the authorities, our motion should prevail and the appeal should be dismissed.

Respectfully submitted,

WELSH & WELSH,
South Bend, Wash.
DORR & HADLEY,
Seattle, Wash.
Solicitors for Appellees.